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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185

To: The Commission

OPPOSITION AND RESPONSE OF COX COMMUNICATIONS, INC. TO PETITIONS FOR RECONSIDERATION

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October 31, 1996

SUMMARY

The Commission should stay the course it set in the *First Report and Order,* and make only those changes that will improve the pro-competitive rules adopted in August. Thus, it should reject efforts to impose undue limitations on new entrants, to treat CMRS providers as if they are LECs and to restrict the scope of the pole attachment rules. The Commission should, however, adopt proposals that will enhance competition.

Several proposals would unduly limit new entrants. First, requiring a new entrant to have an actual tandem to receive reciprocal "tandem" compensation imposes the flaws of incumbents' networks on new entrants and is contrary to basic economic principles. Second, permitting states to require CLECs to meet the requirements for incumbents would be contrary to the model adopted by Congress and would impede the development of competition. Third, there is no evidence that the Commission should adopt new rules against CLEC discrimination, especially in light of existing, well-defined statutory requirements.

The Commission likewise should reject efforts to treat CMRS providers as if they are LECs. The Commission correctly decided that the MTA was the proper CMRS local calling area, given the wide-area nature of CMRS and statutory requirements. Similarly, there is no basis in the Communications Act or in the marketplace for now treating CMRS providers as LECs for regulatory purposes.

At the same time, there is no warrant for changing the rules regarding what constitutes a permissible pole attachment. The rules are consistent with the statute and with current practice. Moreover, utilities have to power to assure that safety concerns are met.

Finally, the Commission should adopt certain proposals that would enhance the development of competition. In particular, the Commission should act to limit incumbent LEC nonrecurring charges, to adopt explicit performance standards for incumbent LECs providing services to new entrants, to open state TELRIC proceedings and to differentiate between charges for transport and termination and those for unbundled switching. These proposals will help prevent incumbent LEC abuses, reduce regulatory barriers to entry into the local telecommunications marketplace and further the intent of the 1996 Act.

TABLE OF CONTENTS

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Cox Communications, Inc. ("Cox"), by its attorneys, hereby submits this opposition and response to petitions for reconsideration of the Commission's *First Report and Order* in the above-reference proceeding.[1/]

I. Introduction

More than 40 petitions for reconsideration were filed in response to the *First Report and Order,* but the Commission should stay the course it set in that order by making only those modifications that enhance competition. The Commission should be particularly wary of proposals to increase regulatory and marketplace burdens on new entrants, including both competitive local exchange carriers ("CLECs") and commercial mobile radio service

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1/ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order,* CC Docket No. 96-86, CC Docket No. 95-185, FCC 96-325, rel. Aug. 8, 1996 (the "*First Report and Order*").

("CMRS") providers, or to blur the distinctions between local exchange service and CMRS. Consequently, it should reject suggestions that new entrants should be required to have an actual tandem to receive reciprocal "tandem" compensation; that states should be allowed to require CLECs to meet the requirements for incumbents; that the Commission should adopt additional rules concerning discrimination by new entrants; that CMRS local calling areas should be reduced; or that CMRS providers should be classified as LECs.

At the same time, the Commission can and should modify its rules to prohibit the imposition of unreasonable charges imposed on CLECs and CMRS providers by incumbent LECs; to further differentiate the charges for transport and termination from those for unbundled switching; to require incumbent LECs to meet performance standards; and to ensure that all parties have the opportunity to participate in proceedings that will determine generally applicable rates for transport and termination, unbundled elements and resold services. These changes will assist in creating an environment in which fair competition can flourish.

II. The Commission Should Resist Efforts to Impose Undue Burdens and Limitations on New Entrants.

Several petitions for reconsideration attack the *First Report and Order* by arguing for the imposition of additional limitations and burdens on new entrants. These parties seek to limit the statutory right to reciprocal compensation, to impose obligations on non-incumbent LECs that exceed those permitted by the 1996 Act[2/] and to have the Commission impose

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2/ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act").

burdensome and unnecessary non-discrimination rules for new entrants. These changes neither serve the public interest nor encourage competition and should be rejected.

A. There Is No Basis for Limiting the Right to Reciprocal Compensation.

Sprint and the Local Exchange Carrier Coalition ("LECC") ask the Commission to modify its rules to limit the rights of new entrants that do not mimic traditional ILEC network architecture to obtain symmetrical compensation for transport and termination. Both Sprint and LECC urge the Commission to forbid CLECs (and, presumably, other carriers) from obtaining "tandem" compensation for transport and termination unless they actually have a tandem.[3/] This proposal is premised on outdated notions of network architecture, is economically unsound and is anticompetitive.

The technologically advanced networks deployed by CLECs and CMRS providers do not follow the architecture that has developed, largely by accretion, for ILEC networks. Indeed, if ILEC networks were created today, they would utilize efficient technology as well. As Cox described in its petition for reconsideration, the key question in determining appropriate compensation should be the functionality provided by a switch. If the switch provides tandem functions, it should be treated as a tandem. If it is used as an end office, it should be treated as an end office.[4/] This approach encourages efficient network design. The Sprint/LECC proposal would require new entrants to mimic the inefficiencies of ILEC networks (either by adding unnecessary layers of switching to their networks or by

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3/ Sprint Petition at 11-13; LECC Petition at 14.

4/ Cox Petition at 3-8.

interconnecting with every end office served by the ILEC) or to endure unbalanced, anticompetitive compensation arrangements for transport and termination.

Moreover, in an efficient, competitive market, charges would be determined by the marketplace, not by the architectures of networks used to provide transport and termination. Using an inefficient network should no more entitle a telecommunications carrier to charge more for transport and termination than using a low-efficiency production line would entitle a manufacturer to charge more for its products.

Finally, there are other good reasons to maintain the symmetry principles already adopted by the Commission. As the Commission noted in the *First Report and Order,* symmetrical pricing maintains incentives to lower costs while eliminating the incentive for ILECs "to negotiate excessively high termination charges[.]" *First Report and Order,* ¶ 1087. Without symmetrical pricing, these incentives could shift dramatically. Indeed, the Cox proposal is much more consistent with the principles underlying the Commission's symmetrical pricing requirement than the Sprint/LECC proposal, and accordingly should be adopted.

B. States Should Not Be Permitted to Impose Requirements on CLECs that Exceed Those Set Forth in the 1996 Act.

The Texas Public Utilities Commission asks the Commission to reverse its determination that state regulators are not permitted to impose the obligations of ILECs on CLECs and other telecommunications carriers. The Commission should not do so. The original decision was consistent with both the express terms of the 1996 Act and the

Congressional intent to adopt a graduated set of obligations for various types of telecommunications carriers.

The 1996 Act plainly differentiated among three groups: telecommunications carriers generally, LECs and incumbent LECs. Each group has its own set of obligations, described in Sections 251(a), (b) and (c), respectively. 47 U.S.C. § 251(a), (b), (c). The conference report on the 1996 Act similarly describes a graduated set of obligations that varies depending on whether a carrier is a telecommunications carrier, a LEC or an ILEC.[5/] With the limited exceptions described below, the 1996 Act did not give either the Commission or state regulators the power to impose the obligations of one group on another. Indeed, Section 251 explicitly defines the *only* circumstances when a CLEC may be treated as an ILEC.[6/] In other words, neither the FCC nor state regulators may casually impose the obligations of ILECs on other carriers.

Moreover, state action that imposed ILEC obligations on CLECs, CMRS providers or other telecommunications carriers would be preemptible under Section 253. 47 U.S.C. § 253. Imposing ILEC obligations on carriers that otherwise are not subject to those obligations plainly would constitute a barrier to entry into the local telecommunications market, contrary to the express policy of Section 253 and the 1996 Act. The current rule, on the other hand, creates a consistent regulatory framework that eliminates uncertainty when a potential new entrant evaluates the costs of entering the telecommunications marketplace.

5/ S. CONF. REP. NO. 104-230, 104th Cong., 2d Sess. 121-2.

6/ 47 U.S.C. § 251(h)(2). In addition, the Commission is empowered to determine that CMRS providers should be treated as LECs. As described below, the Commission should not exercise that power. *See infra* Part III.

The Texas petition also fails to recognize that the Commission has left the states with considerable authority to adopt rules outside the scope of Section 251. There is no provision of the 1996 Act or the Commission's rules that prevents a state regulator from, for instance, adopting reasonable consumer protection requirements for CLECs.[7/] Thus, the Commission has struck an appropriate balance between the requirements of the 1996 Act and the reasonable needs of state regulators to act in the public interest. There is no reason to alter this balance.

C. There Is No Evidence that Specific Rules Are Necessary to Prevent Discrimination by CLECs.

The Information Technology Association of America ("ITAA") asks the Commission to impose new non-discrimination requirements on CLECs in this proceeding.[8/] There is no reason to believe that the Commission needs to adopt such CLEC-specific rules.

In essence, ITAA is asking the Commission to adopt rules before any problem has occurred. While such proactive steps often make sense in the case of monopolists entering related competitive businesses, there is no justification for adopting rules to govern speculative behavior of companies with no market power. New telecommunications carriers lack market power. Therefore, they do not have the incentive or ability to discriminate because discrimination reduces market share, revenues and profits. Only when an entity has market power are specific regulations prohibiting discrimination necessary.

7/ State authority over CMRS providers, of course, is governed by the provisions of Section 332. 47 U.S.C. § 332.

8/ ITAA Petition at 4-6.

ITAA also ignores the existing anti-discrimination provisions of both the Communications Act and state telecommunications laws across the country. *See, e.g.*, 47 U.S.C. § 202. These provisions, combined with the investigation and complaint procedures available to regulators and affected parties, provide ample authority to prevent discrimination and significant incentives for non-dominant telecommunications carriers to avoid unreasonable behavior. In the absence of meaningful evidence of discrimination by CLECs not susceptible to existing regulatory remedies, the existing statutory prohibitions need not be augmented by additional rules.

III. CMRS Providers Should Not Be Treated as If They Are LECs.

In the *First Report and Order,* the Commission correctly determined that CMRS providers should not be treated as LECs under the Communications Act and that the wide-area licensing of CMRS required a local calling area of similar scope. *First Report and Order*, ¶¶ 1004, 1036. Some petitioners ask the Commission to revisit these determinations and, in effect, treat CMRS providers as if they are LECs. First, the LECC asks the Commission to require CMRS providers to conform to ILEC local calling areas for the purpose of determining when traffic is eligible for reciprocal compensation under Section 251(b)(5).[9/] Second, the Colorado Public Utilities Commission (the "Colorado PUC") asks the Commission to reconsider its determination that CMRS providers are not LECs on the ground that the Commission's rules should be technology neutral.[10/] Both of these parties

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9/ LECC Petition at 16-17.

10/ Colorado PUC Petition at 8.

seek to eliminate distinctions between CMRS providers and LECs. The Commission should not do so. Its original decisions were correct as a matter of both law and policy.

Congress has recognized the distinctions between CMRS providers and LECs as a matter of law. The Commission, not the states, has authority over CMRS providers through its Title III radio licensing powers generally, through Section 332 specifically and through the specific delegation of the power to determine whether, at some future date, CMRS providers should be treated as LECs in Section 3. The adoption of the definition of LEC, with the concomitant power for the Commission to determine whether CMRS providers should be treated as LECs, shows that Congress did not believe that CMRS providers should now be treated as LECs. 47 U.S.C. § 153(26).

The nature of CMRS as a wide area service also requires somewhat different regulatory treatment than landline services, and the LECC does not understand this key distinction. For instance, CMRS providers are licensed over wide areas and, as the history of cellular demonstrates, CMRS offerings are best adapted to large local calling areas. The LECC proposal to shoehorn CMRS into local calling areas, defined in some cases 70 years ago, fails to recognize the nature of CMRS and the market it serves.[11/]

The Colorado PUC's request also misses the mark. The Colorado PUC is right that the Commission's rules should, in general, be technology neutral. It is wrong, however, to assume that technology neutral rules require treating all services the same. Rather, the Commission should engage in the inquiry it followed in the *First Report and Order,* and

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11/ It should be noted, however, that the wide area nature of CMRS does not affect incumbent LEC costs for transport and termination of CMRS traffic.

should determine whether a particular CMRS provider is, in fact, a meaningful competitor to landline service. As the *First Report and Order* found, that is not the case today. *First Report and Order,* ¶1004-1006. In the absence of evidence that CMRS is an actual — not merely theoretical — substitute for landline service, there is no basis for the Colorado PUC's request. It, along with the LECC request, should be rejected as contrary to Congressional intent and good policy.

IV. The Commission Should Not Reconsider Its Rules on the Use of Rights of Way.

Several utilities seek reconsideration of the portion of the Commission's revised pole attachment rules that, in their view, expands the scope of the attachments that may be made to utility poles.[12/] These utilities are concerned that telecommunications carriers might attach facilities other than wiring or cables to utility polies. *Id.* The Commission should reject these requests in light of the terms of Section 224(a)(4), current practices and the public interest benefits of the rules as adopted.

First, Section 224(a)(4), which defines the term "attachment," does not restrict the nature of the facilities that may be attached to a pole, duct, conduit or other right-of-way. Rather, it includes "any attachment." 47 U.S.C. § 224(a)(4). Thus, the plain language of the statute does not permit the conclusion that attachments are limited to wiring or cables.

Second, as a practical matter, current pole attachments are not limited to wiring or cables. Utility poles often carry amplifiers and other equipment, placed by both the utilities that own the poles and by other users. The only appropriate concern is whether these

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12/ *See, e.g.,* Florida Power & Light Petition at 24.

attachments meet reasonable safety standards, an area in which the Commission has left considerable discretion to pole owners. *See First Report and Order,* ¶¶ 1151, 1176.

Finally, significant public interest benefits flow from the Commission's rules. As the *First Report and Order* acknowledges, access to poles and other rights-of-way is critical for new entrants in the telecommunications marketplace. Without access to these facilities, it will be much more difficult for new entrants to construct their own facilities and serve their customers. Utility poles are the best place for many accessory attachments, such as amplifiers. In fact, some Commission-approved services, such as cable-based PCS, depend on the use of pole attachments for facilities other than passive cables. At the same time, there also are benefits from consolidating telecommunications, cable and utility facilities whenever possible, which minimizes the burden of those facilities on the public. These concerns strongly support leaving those rules intact.

V. The Commission Should Adopt Certain Proposals for Reconsideration of Its Rules.

While the requests for reconsideration described above should be denied, there are certain requests that should be granted. In particular, the Commission should adopt AT&T's proposal to limit non-recurring charges by ILECs; Teleport's request for explicit performance standards for incumbent LECs; the MFS request that the Commission assure that all interested parties may participate in TELRIC proceedings; and the request to limit the charges for transport and termination to additional cost, as is required by the 1996 Act. These proposals will advance the purposes of the 1996 Act.

First, it is important for the Commission to prevent incumbent LECs from using non-recurring charges to eliminate competition. As AT&T notes, it is possible that such charges, if not limited to actual costs, could become a significant barrier to entering the local telecommunications marketplace.[13/] Equally important, charges in excess of actual cost are violative of the requirements of Sections 251 and 252(d), which require just, reasonable and non-discriminatory charges that are cost-based. 47 U.S.C. §§ 251, 252(d). The Commission specifically should prohibit incumbent LECs from imposing the same non-recurring charge on multiple new entrants when the charge to the first entrant covered all or most of the costs associated with the charge. Rather, ILECs should be required to adopt mechanisms that spread the costs over all users of a service or element.

Second, the Teleport proposal for explicit performance standards for incumbent LECs should be adopted.[14/] Performance standards are critical to implementation of the obligations imposed on incumbent LECs by Sections 251(b) and (c) of the Communications Act. Without explicit standards and penalties for failing to meet those standards, incumbent LECs have little incentive to provide interconnection, transport and termination or unbundled elements on a non-discriminatory basis. Periodic and public reports on incumbent LEC service quality also are critical to ensure that meaningful scrutiny is possible. In fact, many states have taken similar steps to ensure the quality of service provided to the public. Reporting on the quality of service provided to new entrants and other interconnectors is a

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13/ AT&T Petition at 10.

14/ Teleport Communications Group ("Teleport") Petition at 3-6.

logical outgrowth of those existing requirements and the 1996 Act's prohibitions on discrimination.

Third, the Commission should adopt the suggestion of MFS Telecommunications that state proceedings to determine TELRIC rates should be open to all potentially interested parties.[15/] While Section 252 contemplates individual arbitrations, in practice any arbitration that determines TELRIC or other final rates is likely to have a precedential effect on other proceedings and negotiations. As a result, any time that a state sets generally applicable or permanent rates for transport and termination, unbundled elements or resale, any party that could seek interconnection potentially is affected. Thus, it is logical, and will conserve regulatory resources, to require state regulators to open any proceeding that sets rates that could be generally applicable to interconnecting parties. In addition, it is not enough for such proceedings to be open after an administrative law judge has heard the evidence, because that deprives non-parties of the opportunity to provide their own evidence or demonstrate the accuracy or inaccuracy of the evidence presented to the initial finder of fact. Rather, proceedings that determine permanent or generally applicable rates for transport and termination, unbundled elements or resale should be open from the beginning.

Finally, the Commission should adopt the proposals by Teleport Group and the National Cable Television Association ("NCTA") to further reconsider and further differentiate the relative pricing standards for unbundled switching and transport and termination.[16/] As Cox and many others demonstrated in the comments in this proceeding, Sections 252(d)(1) and 252(d)(2) embody distinct pricing standards. The Commission

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15/ MFS Petition at 19.

16/ Teleport Petition at 6-9; NCTA Petition at 7-14.

should, as a matter of statutory construction, recognize that distinction.[17/] Using the TELRIC standard for both unbundled switching and transport and termination does not recognize this distinction because it permits inclusion of costs other than those incurred as additional costs in the calculation of compensation for transport and termination. There also are important functional distinctions between unbundled switching, which includes all of the functionalities of the switch, and transport and termination, which consists merely of routing a call.[18/]

The Commission already has taken a step towards recognizing the distinctions between transport and termination and unbundled switching when it reconsidered some elements of the *First Report and Order* on its own motion.[19/] It should complete the process by adopting the Teleport and NCTA proposals to require the charges for transport and termination to reflect only the additional costs incurred by the terminating carrier.

17/ *See* Comments of Cox at 21-22.

18/ At the same time, transport and termination are parts of a mutually beneficial relationship in which both carriers originate and receive calls. The only benefit to the provider of unbundled switching is the monetary compensation it receives. This distinction also justifies lower charges for transport and termination than for unbundled switching. *Id.* at 30-31.

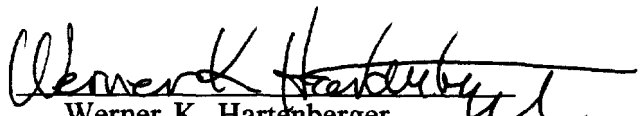
19/ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *Order on Reconsideration,* CC Docket 96-98, CC Docket 95-185, FCC 96-394, rel. Sept. 27, 1996, at ¶ 10.

VI. Conclusion

For all of these reasons, Cox respectfully requests that the Commission modify the rules adopted in the *First Report and Order* in accordance with this petition.

Respectfully submitted,

COX COMMUNICATIONS, INC.



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CERTIFICATE OF SERVICE

I, Tammi A. Foxwell, a secretary at the law firm of Dow, Lohnes & Albertson, do hereby certify that on this 31st day of October, 1996, the foregoing "Opposition and Response of Cox Communications, Inc. to Petitions for Reconsideration" was sent via U.S. first-class mail, postage prepaid, or via hand delivery where indicated, to the following:

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